UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

2008 MSPB 246

Docket No. DA-1221-08-0182-W-1

Tommy L. Swanson, Sr,

Appellant,

v.

General Services Administration,

Agency.

December 4, 2008

Gail M. Dickenson, Esquire, Dallas, Texas, for the appellant.

Lee W. Crook, III, Esquire, Fort Worth, Texas, for the agency.

Melissa Putman, Esquire, Fort Worth, Texas, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 The appellant has petitioned for review of the initial decision that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons set forth below, we GRANT the appellant's petition, VACATE the initial decision, and REMAND the case for adjudication on the merits.

BACKGROUND

¶2 On June 11, 2001, the appellant, then a Program Analyst, GS-0343-13, was detailed to the agency's Office of Enterprise Development (OED) in Fort Worth,

Texas. Initial Appeal File (IAF), Tab 12, Ex. 6. In that position, he served as Director of the Small Business Office (SBO) and worked under the supervision of Deputy Regional Administrator Leighton Waters, who was at that time the Acting Regional Administrator. *Id*. (agency's narrative statement). The detail was subsequently extended, and became permanent on April 21, 2002, when the appellant was reassigned to the position of Supervisory Business Specialist, GS-1101-13, at OED. *Id*., Ex. 6. On June 5, 2002, Scott Armey was appointed to the Regional Administrator position, thereby becoming the appellant's second-level supervisor. *Id*., Ex. 8. Effective August 25, 2002, the appellant was reassigned to a Management Analyst position, GS-0343-13, with the Human Resources and Program Support Division, Employee Services Center. *Id.*, Ex. 9. The appellant has since been detailed or reassigned to various positions within the agency's Public Buildings Service (PBS). *Id*., Ex. 11-15, 17, 18. He has also applied for three vacant positions for which he was not selected and has been denied multiple requests for temporary promotions. *Id.*, Ex. 16, 21-26.

¶3 On July 20, 2007, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging retaliation for protected whistleblowing activity. IAF, Tab 4. In his complaint form and subsequent correspondence with OSC, he identified the following disclosures:

(1) in June 2002, reporting to Armey that Waters had "undermined both the integrity and ability of [the SBO] to perform its mission effectively by eliminating all but two positions for the entire region," and was using "bullying tactics" in an attempt to force him to develop a "virtual office," which would further reduce the SBO's effectiveness;

(2) in June 2003, disclosing unspecified information to the agency's Office of the Inspector General (OIG); and

(3) at some point in 2002, questioning Armey about his politically motivated decision to require him to hire a Hispanic individual.

The appellant alleged that following disclosure (1), Armey convinced Waters to fund an additional position, whereupon Waters immediately reassigned him from his position with SBO. According to the appellant, he later learned that Armey, Waters, and legal department representatives, Jerry Ann Foster and Lee Crook, were "aware, communicating, and conspiring" to manufacture false fraud charges against him with the U.S. Attorney's Office and the OIG. He further alleged that his disclosure was discussed with Jim Weller and Kenny Smith at PBS, who subsequently assigned him to menial tasks and failed to select him for promotions. With regard to disclosure (2), the appellant generally alleged that the agency responded with "threats of taking actions, failure to take corrective action, and . . . a personnel action." With regard to disclosure (3), the appellant alleged that Armey retaliated against him by removing him from his supervisory position, and that Weller and Smith have since subjected him to a hostile work environment and the denial of equal employment opportunities. *Id*.

¶4 On November 13, 2007, OSC notified the appellant that it had terminated its investigation into his complaint. IAF, Tab 1. The appellant then filed a timely IRA appeal with the Board. *Id*. The administrative judge (AJ) issued a show-cause order informing the appellant of his burden of proof on jurisdiction and ordering him to submit evidence and argument on the issue. IAF, Tab 3. The appellant responded by providing a copy of his original complaint and subsequent correspondence with OSC. IAF, Tab 4. In addition to the matters raised in his OSC complaint, the appellant further alleged that he had disclosed to Armey that Waters was attempting to violate the law by hiring based on political reasons, and that he had made the same disclosures to the head of the agency. *Id*.

¶5 The AJ initially found jurisdiction and scheduled a hearing. IAF, Tab 11 (summary of telephonic status conference). She also denied the agency's claim of laches. *Id*. Upon further review of the record, however, she found that the appellant's statements before OSC were insufficient to satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3), and that the appeal was therefore outside

the Board's jurisdiction. IAF, Tab 14. Accordingly, she cancelled the hearing and dismissed the appeal. *Id.*, IAF, Tab 15 (Initial Decision, May 13, 2008). On petition for review, the appellant contends that the AJ erred in dismissing his appeal without a hearing. Petition for Review File (PFRF), Tab 3. The agency has filed a response. PFRF, Tab 4.

ANALYSIS

¶6 The Board has jurisdiction over an IRA appeal if the appellant has exhausted his or her administrative remedies before OSC and makes nonfrivolous allegations that: (1) he engaged in whistleblowing activity by making a protected disclosure, and (2) the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *Yunus v. Department of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001); *Rusin v. Department of the Treasury*, 92 M.S.P.R. 298, ¶ 12 (2002). If the appellant establishes Board jurisdiction over his IRA appeal by exhausting his remedies before OSC and making the requisite nonfrivolous allegations, he has the right to a hearing on the merits of his claim. *Spencer v. Department of the Navy*, 327 F.3d 1354, 1356 (Fed. Cir. 2003); *Rusin*, 92 M.S.P.R. 298, ¶ 12.

¶7 Under 5 U.S.C. § 1214(a)(3), an employee is required to seek corrective action from OSC before seeking corrective action from the Board. The Board's jurisdiction is limited to issues raised before OSC. *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993). To meet the exhaustion requirement, the appellant must provide OSC a sufficient basis to pursue an investigation which might have led to corrective action. *Briley v. National Archives and Records Administration*, 236 F.3d 1373, 1377 (Fed. Cir. 2001). That is, the appellant must articulate with reasonable clarity and precision before OSC the basis for his complaint of whistleblowing reprisal. *Id.*; *Coufal v. Department of Justice*, 98 M.S.P.R. 31, ¶ 14 (2004). In showing that the exhaustion requirement has been met, the appellant is not limited by the

statements in his initial complaint, but may also rely on subsequent correspondence with OSC. *See Pasley v. Department of the Treasury*, 109 M.S.P.R. 105, ¶¶ 12-15 (2008). An appellant who has informed OSC of the basis for his retaliation claims may add further detail to those claims before the Board. *Briley*, 236 F.3d at 1378.

¶8 The appellant's vague allegations concerning an unspecified disclosure to the OIG do not satisfy the exhaustion requirement of 5 U.S.C. § 1214(a)(3). However, contrary to the initial decision, we find that the appellant satisfied the exhaustion requirement with respect to disclosures (1) and (3). In each case, he specified with reasonable clarity and precision the content of the disclosure, the individual to whom it was made, the nature of the personnel actions that were allegedly taken in retaliation, and the individuals responsible for taking those actions. These essential details were sufficient to provide OSC with a basis for an investigation that might have led to corrective action. *See Briley*, 236 F.3d at 1378 (exhaustion requirement satisfied where appellant's letters to OSC contained the "core" of her retaliation claim).

¶9 Our jurisdictional analysis does not end here, however, as we must still determine whether the appellant has made nonfrivolous allegations that he made a protected disclosure and that the disclosure was a contributing factor in the agency's decision to take or fail to take a personnel action. *See Horton v. Department of Veterans Affairs*, 106 M.S.P.R. 234, ¶ 14 (2007). In cases involving multiple alleged protected disclosures and multiple alleged personnel actions, where an appellant makes a nonfrivolous allegation that at least one alleged personnel action was taken for at least one alleged protected disclosure, he establishes the Board's jurisdiction over his IRA appeal. *Id*.

¶10 A protected disclosure under the Whistleblower Protection Act (WPA) is defined as a disclosure of information that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public

health or safety. *See* 5 U.S.C. § 2302(b)(8). The test to determine whether a putative whistleblower has a reasonable belief in the disclosure is an objective one: whether a disinterested observer, with knowledge of the essential facts known to and readily ascertainable by the employee, could reasonably conclude that the actions of the agency evidenced one of these categories of wrongdoing. *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

¶11 We find that, accepting the appellant's allegations as true, he had a reasonable belief that the information he disclosed to Armey evidenced gross mismanagement on the part of Waters. Gross mismanagement means more than de minimis wrongdoing or negligence; it means a management action or inaction that creates a substantial risk of significant adverse impact on the agency's ability to accomplish its mission. *Shriver v. Department of Veterans Affairs*, 89 M.S.P.R. 239, ¶ 7 (2001). Contrary to the initial decision, gross mismanagement does not require an "element of blatancy." *See White v. Department of the Air Force*, 391 F.3d 1377, 1383 (Fed. Cir. 2004); *Tatsch v. Department of the Army*, 100 M.S.P.R. 460, ¶ 12 (2005). If, as the appellant alleges, Waters undermined the ability of the SBO to perform its mission by drastically cutting the number of employees, a reasonable person could conclude that Waters committed an act of gross mismanagement.[*] While this is a close case, any doubt or ambiguity as to whether the appellant has made a nonfrivolous allegation of a reasonable belief should be resolved in favor of a finding that jurisdiction exists. *Smart v. Department of the Army*, 98 M.S.P.R. 566, ¶ 9, *aff'd*, 157 F.App'x 260 (Fed. Cir. 2005), *cert. denied*, 547 U.S. 1059 (2006). We therefore conclude that the appellant has made a nonfrivolous allegation that disclosure (1) was protected under the WPA.

---

[*] Moreover, although the appellant did not describe the "bullying tactics" allegedly employed by Waters, the Board has held that intimidation of other employees may constitute an abuse of authority. *See Pasley*, 109 M.S.P.R. 105, ¶ 18.

¶12 We further find that the appellant has made a nonfrivolous allegation that disclosure (1) was a contributing factor in the agency's decision to take or fail to take a personnel action against him. In a 1994 amendment to the WPA, Congress established a knowledge/timing test that allows an employee to demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that the official taking the personnel action "knew of the disclosure," and that the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor. 5 U.S.C. § 1221(e)(1); *Rubendall v. Department of Health & Human Services*, 101 M.S.P.R. 599, ¶ 12 (2006). To satisfy the test, the appellant need only demonstrate that the fact of, not necessarily the content of, the protected disclosure was one of the factors that tended to affect the personnel action in any way. *Rubendall*, 101 M.S.P.R. 599, ¶ 11. A reassignment is a personnel action under the WPA, *see Paul v. Department of Agriculture*, 66 M.S.P.R. 643, 650 (1995), and the appellant's statements before OSC imply that Armey, as well as Waters, was responsible for the decision to reassign him from his Supervisory Business Specialist position. Armey, at least, was at that time aware of disclosure (1), and the interval of 2-3 months between the disclosure and the reassignment is sufficiently brief that a reasonable person could conclude that the disclosure was a contributing factor. *See Rubendall*, 101 M.S.P.R. 599, ¶ 13 (interval of less than 6 months satisfied the knowledge/timing test). The appellant has therefore made a nonfrivolous allegation that at least one protected disclosure was a contributing factor in the agency's decision to take at least one personnel action against him. *See Horton*, 106 M.S.P.R. 234, ¶ 19.

¶13 Accordingly, we find that the appellant has established the Board's jurisdiction over his IRA appeal.

ORDER

¶14 The appeal is remanded to the Dallas Regional Office for a hearing and adjudication on the merits.

FOR THE BOARD:

_____
William D. Spencer
Clerk of the Board
Washington, D.C.